

**Exhibit No.** 3



DAPHNE E. BARBEE

ATTORNEY AT LAW

1188 BISHOP STREET, SUITE 1909, HONOLULU, HAWAII 96813  
TELEPHONE (808) 533-0275

June 22, 2006

Office of the Clerk  
United State Court of Appeals for the Ninth Circuit  
121 Spear Street, P. O. Box 193939  
San Francisco, Ca 94105-3939

RE: Ware v. Chertoff, Secretary of Department of Homeland Security; Transportation Security Agency (TSA), Petition for Relief of Agency Decision under 49 U.S.C. 46610(c)

Dear Ninth Circuit Clerk:

Please file the enclosed Petition for Relief in the above matter. I am enclosing the filing fee of \$455.00 and a self addressed envelop for return copies of the Petition. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Barbee', written over a horizontal line.

Daphne E. Barbee  
Attorney at Law

enc.

cc: Mr. Thomas Helper, US Attorney

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner RAYMOND E. WARE hereby petitions for review by this Court of the administrative final order denying discovery requests for recertification test results of Petitioner RAYMOND E. WARE entered by the Department of Homeland Security (DHS) which has oversight over the

Transportation Security Agency (TSA) on April 25, 2006. A copy of the decision is attached as Exhibit "A".

Jurisdiction and venue is asserted pursuant to 49 U.S.C. § 46610(c).

This petition is timely filed pursuant to 49 U.S.C. § 46610(c) as it is filed within 60 days of the final order denying discovery from TSA.

This petition is based upon Petitioner's Title VII complaint for discrimination against Respondent Agency filed in the United States District Court for the District of Hawaii (see Exhibit "B"). Petitioner, a former airport screener, requested as discovery in the U.S. District Court case the re-certification test results and standards which Responding Agency claimed Plaintiff failed and used as a basis to terminate him. The U.S. District Court declined to order the discovery requested or to rule on constitutional challenge to TSA's order, stating the Ninth Circuit Court has jurisdiction over this matter.

Petitioner will file the appropriate brief in support of the Petition and a Record on Appeal pursuant to this Court's briefing schedule.

Dated: Honolulu, Hawaii 6-22-06

Respectfully submitted,

  
\_\_\_\_\_  
DAPHNE E. BARBEE  
ATTORNEY FOR PETITIONER

Exhibit No. A



Transportation  
Security  
Administration

**Final Order on Request for Conditional Disclosure of SSI  
in Documents Responsive to Discovery in *Ware v. Hayakawa*, Civ. No. 04-00671 (D. Haw.)**

**I. Request for Conditional Disclosure of Sensitive Security Information ("SSI")**

In connection with *Ware v. Hayakawa*, Civ. No. 04-00671 (D. Haw.), Plaintiff Ware (hereinafter "Plaintiff Requester") requests access to SSI contained in documents that are responsive to discovery requests served in the litigation.

**II. Standard for Determination**

Whether the disclosure of the requested SSI, subject to the proposed conditions, "would not be detrimental to transportation security." 49 C.F.R. § 1520.15(e).

**III. Statutory and Regulatory Background**

In furtherance of a congressional mandate to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out [civil aviation] security . . . if the [TSA Administrator] decides that disclosing the information would . . . be detrimental to the security of transportation," see 49 U.S.C. § 114(s)(1)©, TSA regulations prescribe the maintenance, safeguarding, and disclosure of SSI. See 49 C.F.R. Part 1520. SSI, by definition, is "information obtained or developed in the conduct of security activities, including research and development, the disclosure of which TSA has determined would . . . be detrimental to the security of transportation." 49 C.F.R. § 1520.5(a)(3).

Access to SSI is strictly limited to those persons with a need to know, as defined in 49 C.F.R. § 1520.11, and to those persons to whom TSA authorizes disclosure under 49 C.F.R. § 1520.15. In general, a person has a need to know specific SSI when he or she requires access to the information: (1) to carry out transportation security activities that are government-approved, -accepted, -funded, -recommended, or -directed, including for purposes of training on, and supervision of, such activities; (2) to provide legal or technical advice to airport operators, air carriers or their employees regarding security-related requirements; or (3) to represent airport operators, air carriers or their employees in judicial or administrative proceedings regarding security-related requirements. 49 C.F.R. § 1520.11(a). Members of the public, including civil litigants, do not have a regulatory need to know, unless they fall into the categories noted above. 49 C.F.R. §§ 1520.11, 1520.15(a).

TSA may authorize a conditional disclosure of specific SSI to a person who does not otherwise have a regulatory need to know "upon written determination by TSA that disclosure of such records or information . . . would not be detrimental to transportation security." 49 C.F.R. § 1520.15(e). TSA also grants access to prescribed groups of persons without a regulatory need to know, including members of Congress and persons who require access to specific SSI in order to respond to enforcement actions brought by the agency. 49 C.F.R. § 1520.15©, (d).

#### IV. Analysis

Since its inception in the wake of the devastating attacks of September 11, 2001, TSA has placed stringent protections on SSI, as the agency has determined that it is in the best interests of the public to restrict, to the greatest extent possible, the dissemination of any information that could be used to thwart security countermeasures by those intent upon committing criminal acts against civil aviation. Since September 11, 2001, it has been the consistent policy of TSA that the present and continuing threat of terrorist attacks against aviation interests requires that the number of persons having access to SSI be significantly and continually decreased, rather than increased. TSA initially reached this conclusion in significant part because intelligence reports indicated that al-Qa'ida operatives have, through media sources and other publicly available research, obtained access to information concerning existing security vulnerabilities at American airports.

Current intelligence information indicates that the terrorist threat against civil transportation targets continues to be a grave and ongoing concern. Reports indicate that al-Qa'ida and other terrorist operatives continue to develop plans for catastrophic attacks against targets in the United States and against United States' interests overseas. Intelligence information demonstrates that terrorists actively seek to discover security methods and vulnerabilities they can exploit in planning future attacks against civil aviation.

This intelligence information is supported by the recent audiotape warnings issued by Usama Bin Ladin and Ayman Al-Zawahiri in January and March 2006, the deadly attacks carried out on the London subway and bus lines in July 2005, the Madrid subway bombings in March 2004, and the very real possibility of future (as yet undiscovered) plans for attacks on the United States.

TSA must assess the security risks inherent in granting the requested conditional disclosure by also considering the risk of granting all similar requests in all civil litigation involving SSI. SSI is at issue in dozens of civil lawsuits at any given time, including in lawsuits alleging discriminatory application of security requirements, employment actions, patent infringement, and personal injury. In each of these lawsuits, there is at least one attorney or party who seeks access to SSI for purposes of pursuing the litigation. If access in civil litigation is provided, the number of persons with access to SSI necessarily multiplies with each new lawsuit filed, and the likelihood of inadvertent or intentional release or other misuse of SSI grows exponentially. Importantly, TSA also cannot rule out the possibility that terrorists might seek

access to SSI by filing frivolous lawsuits and pursuing discovery, or that civil litigants might disclose SSI to terrorists. The agency cannot make meaningful security distinctions between civil litigants and has been unwilling to favor certain litigants over others based on the perceived importance of any particular litigation. Accordingly, consistent with its goal to reduce significantly the number of persons with access to SSI, since September 11, 2001, TSA has denied all requests to see SSI by civil litigants and/or their attorneys who do not otherwise have a need to know, as defined in 49 C.F.R. Part 1520.

V. Determination

I deny the instant request for conditional disclosure of SSI under 49 C.F.R. § 1520.15(e), as I do not find that such disclosure "would not be detrimental to transportation security."

This Order is issued under 49 U.S.C. § 114(a) and is final. Pursuant to 49 U.S.C. § 46110, any person disclosing a substantial interest in this Order may, within 60 days of its issuance, apply for review by filing a petition for review in an appropriate U.S. Court of Appeals.

Date: 4/25/2006

  
Andrew Colsky  
Director, SSI Office





Transportation  
Security  
Administration

**Final Order on Requests for Identification of Sensitive Security Information  
in Documents Responsive to Discovery in *Ware v. Hayakawa*, Civ. No. 04-00671 (D. Haw.)**

**I. Requests for Identification of Sensitive Security Information (SSI)  
in Submitted Documents**

In connection with *Ware v. Hayakawa*, Civ. No. 04-00671 (D. Haw.), the Transportation Security Administration ("TSA") has reviewed documents responsive to discovery requests in the above-captioned litigation in order to make a final determination as to whether they contain SSI. Attorneys for Defendant TSA (hereinafter "Defendant Submitter") forwarded to TSA's SSI Office 21 pages of documents (hereinafter "submitted documents") for review and final SSI determination, as discussed herein.

**II. Delegation of Authority to Make Final SSI Determination**

The authority to identify information pertaining to transportation security as SSI is delegated to the Director of the SSI Office, pursuant to a delegation order signed by then Acting Deputy Administrator, Kenneth Kasprisin, on April 29, 2005. This delegation order is in effect as of the date of this Final Order and has not been amended.

**III. Review Process**

Pursuant to 49 U.S.C. § 114(s) and 49 C.F.R. Part 1520, TSA's security experts carefully reviewed each page of the submitted documents for the purpose of identifying SSI therein and redacting the documents to delete SSI where possible. To minimize the impact on the litigation, TSA's review withheld the minimum SSI material necessary to protect transportation security.

To that end, agency security and SSI experts performed multiple reviews of each document. Each page was subjected to a line-by-line review for SSI, which review included consultation with subject-matter experts, and reference to past precedents and open-source (media and other public) information. For example, in order to ensure consistency in SSI decision-making, and to ensure that no sensitive security information is inadvertently released, TSA compared each document to the database it maintains of all documents that have been reviewed previously for public release. TSA also paid particular attention to identifying any older information that no longer needed to be protected, and TSA has authorized the disclosure of all such information.

TSA's SSI determinations are based on the knowledge that the disclosure of even small pieces of seemingly innocuous information could be used by terrorists to construct a mosaic that can be analyzed and synthesized to reveal existing security measures and vulnerabilities. As provided in 49 C.F.R. Part 1520, only if a security countermeasure is obsolete, in that it will not be revived and therefore reveals nothing about current or future security countermeasures, or if security intelligence is overtaken by events, will information lose its SSI protection and be released publicly.

#### IV. Final SSI Determination

TSA has completed its review of each document submitted by the Defendant Submitters, has identified SSI contained therein, if any, and has created redacted versions of the documents, where possible. The agency returned the submitted documents to the Defendant Submitter, together either with authorization to release the document as redacted or with instructions to withhold the document in full. The SSI Office has reviewed each submitted document, and I have determined that the withheld information is SSI, pursuant to 49 U.S.C. § 114(s) and 49 C.F.R. Part 1520.

The documents, as returned to the Defendant Submitter, are attached. As indicated on the attached pages, the redacted information constitutes SSI under 49 C.F.R. §§ 1520.5(b)(5), 1520.5(b)(8)(i), 1520.5(b)(9)(i), and 1520.5(b)(10).

#### V. Final Order

This Order is issued under 49 U.S.C. § 114(s) and is final. Pursuant to 49 U.S.C. § 46110, any person disclosing a substantial interest in this Order may, within 60 days of its issuance, apply for review by filing a petition for review in an appropriate U.S. Court of Appeals.

Date: 4/25/2006

  
Andrew Colsky  
Director, SSI Office

file:///C:/Documents%20and%20Settings/sara.hicks/Local%20Settings/Temp/EEO-Ware-03-Patdown-Retest%2001-09-06.html

0	Employee	ware, raymond
0	Score	12
0	Date	Nov 7 2003 12:00AM
0	Retest	Yes
0	Pass	No
1	Informs person and asks to divest; (offers private screening)	Meets Standard
2	Asks person to remove outer articles, belt, and shoes	Meets Standard
3	Tells person to take stance with arms stretched outward (slightly forward)	Meets Standard
4	Position person facing his/her property	Meets Standard
5	Check head, collar, shoulder	Meets Standard
6	Screens [REDACTED] using correct procedures; completes	Meets Standard
6a	[REDACTED]	
6b	[REDACTED]	1520.5 (b)(4)(i)
6c	[REDACTED]	
6d	[REDACTED]	
7	Screens [REDACTED] using correct procedures; completes	Meets Standard
7a	Ask to lower arms	
7b	Pat down chest (females correctly)	
7c	Pat down front [REDACTED]	
7d	Pat down front [REDACTED]	
7e	Crotch area	
7f	Leg and Foot	
8	Asks person to sit down; pats down feet	Meets Standard
9	Refers shoes to further inspection (x-ry or examination)	Meets Standard
10	Communicates to person throughout process, explaining in clear and, conci	Meets Standard
11	Communicates with person in polite and respectful manner.	Meets Standard
12	When conducting the pat-down procedures uses back of hand in sensitive ar	Meets Standard
13	Finds Prohibited Item:	No
*	Please enter any additional comments:	Does not Meet Standard
a	Does not follow SOPs	No
b	Does not have ready familiarity of procedures	No
c	Too assertive when dealing with passenger	No
d	Too passive when dealing with passenger	No
e	Applies too much physical force with passengerr	No
f	Applies too little physical force with passenger	No
*	Please enter any additional comments:	Does not Meet Standard
g	Takes too much time performing function	No
h	Rushes through function	No
i	Does not proper actions with respect to prohibitive item found	No
j	Does not effectively explain regulations to passenger when prohibitive it	No
k	Does not exercise care when dealing with passengers' property	No

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file:///S:/TSASharedFolders/COS/SSI/9000\_Miscellaneous\_Records/9895\_Ware\_v\_Hayakawa/EEO-Ware-03-Patdown-Test%2001-09-06.htm

0	Employee	ware, raymond
0	Score	7
0	Date	Nov 6 2003 12:00AM
0	Retest	No
0	Pass	No
1	Informs person and asks to divest; (offers private screening)	Does not Meet Standard
2	Asks person to remove outer articles, belt, and shoes	Does not Meet Standard
3	Tells person to take stance with arms stretched outward (slightly forward)	Meets Standard
4	Position person facing his/her property	Meets Standard
5	Check head, collar, shoulder	Does not Meet Standard
6	Screens [REDACTED] using correct procedures; completes	Does not Meet Standard
6a	[REDACTED]	Yes
6b	[REDACTED]	No
6c	[REDACTED]	Yes 15205(b)(9)(i)
6d	[REDACTED]	No
7	Screens [REDACTED] using correct procedures; completes	Does not Meet Standard
7a	Ask to lower arms	No
7b	Pat down chest (females correctly)	No
7c	Pat down front [REDACTED]	No
7d	Pat down front [REDACTED]	No
7e	Crotch area	Yes
7f	Leg and Foot	Yes
8	Asks person to sit down; pats down feet	Meets Standard
9	Refers shoes to further inspection (x-ray or examination)	Meets Standard
10	Communicates to person throughout process, explaining in clear and, conci	Meets Standard
11	Communicates with person in polite and respectful manner.	Meets Standard
12	When conducting the pat-down procedures uses back of hand in sensitive ar	Meets Standard
13	Finds Prohibited Item:	Yes
*	Please enter any additional comments:	Does not Meet Standard
a	Does not follow SOPs	Yes
b	Does not have ready familiarity of procedures	Yes
c	Too assertive when dealing with passenger	No
d	Too passive when dealing with passenger	No
e	Applies too much physical force with passengerr	No
f	Applies too little physical force with passenger	No
*	Please enter any additional comments:	Does not Meet Standard
g	Takes too much time performing function	No
h	Rushes through function	No
i	Does not proper actions with respect to prohibitive item found	No
j	Does not effectively explain regulations to passenger when prohibitive it	No
k	Does not exercise care when dealing with passengers' property	No

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0	Employee	ware, raymond
0	Score	11
0	Date	Nov 7 2003 12:00AM
0	Retest	Yes
0	Pass	No
1		Meets Standard
2		Meets Standard
3		Does not Meet Standard
4		Meets Standard
5		Meets Standard
6		Meets Standard
7		Does not Meet Standard
8		Meets Standard
9	Electronic Items: Uses correct sampling procedures	Meets Standard
9a		1520.5(b)(4)(c)
9b		
9c		
10	Inspects items for signs	Meets Standard
11	Communicates to person throughout process, explaining in clear and concis	Does not Meet Standard
12	Communicates with person in polite and respectful manner	Meets Standard
13	Thanks and offers passenger opportunity to repack bag/item	Meets Standard
14	Demonstrates correct bag control procedures	Meets Standard
*	Please enter any additional comments:	Does not Meet Standard
a	Does not follow SOPs	Yes
b	Does not have ready familiarity of procedures	No
c	Too assertive when dealing with passenger	No
d	Too passive when dealing with passenger	No
e	Applies too much physical force with passengerr	No
f	Applies too little physical force with passenger	No
*	Please enter any additional comments:	Does not Meet Standard
g	Takes too much time performing function	No
h	Rushes through function	No
i	Does not proper actions with respect to prohibitive item found	No
j	Does not effectively explain regulations to passenger when prohibitive it	No
k	Does not exercise care when dealing with passengers' property	No

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0	Employee	ware, raymond
0	Score	9
0	Date	Nov 6 2003 12:00AM
0	Retest	No
0	Pass	No
1		Meets Standard
2		Meets Standard
3		Meets Standard
4		Does not Meet Standard
5		Meets Standard
6		Does not Meet Standard
7		Does not Meet Standard
8		
9	Electronic Items: Uses correct sampling procedures	Does not Meet Standard
9a		No (520.5(b)(1)(i))
9b		No
9c		Yes
10	Inspects items for signs	Meets Standard
11	Communicates to person throughout process, explaining in clear and concis	Meets Standard
12	Communicates with person in polite and respectful manner	Meets Standard
13	Thanks and offers passenger opportunity to repack bag/item	Meets Standard
14	Demonstrates correct bag control procedures	Meets Standard
*	Please enter any additional comments:	Does not Meet Standard
a	Does not follow SOPs	Yes
b	Does not have ready familiarity of procedures	No
c	Too assertive when dealing with passenger	No
d	Too passive when dealing with passenger	No
e	Applies too much physical force with passenger	No
f	Applies too little physical force with passenger	No
*	Please enter any additional comments:	Does not Meet Standard
g	Takes too much time performing function	No
h	Rushes through function	No
i	Does not proper actions with respect to prohibitive item found	No
j	Does not effectively explain regulations to passenger when prohibitive it	No
k	Does not exercise care when dealing with passengers' property	No

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0	Employee	ware, raymond
0	Score	11
0	Date	Nov 6 2003 12:00AM
0	Retest	No
0	Pass	No
1	Informs person of HHMD search	Meets Standard
2	Asks person to divest metallic items	Meets Standard
3	Asks person if there is anything on his/her person that may cause the HHM	Does not Meet Standard
4	Tests the HHMD before screening person	Meets Standard
5	Positions person facing his/her property	Meets Standard
6	Asks person to be seated	Does not Meet Standard
7	Hand wands footwear and removes if alarms	Does not Meet Standard
8	Hand wands feet without shoes	Does not Meet Standard
9	Asks person to stand with feet shoulder-width apart; arms outstretched	Meets Standard
10	Starts	Meets Standard
11	Uses correct HW	Does not Meet Standard
12	Hand wands between	Meets Standard
13	Wands using correct procedures; completes	Does not Meet Standard
13b		No
13c		No
13d		No — 1520.5(b)(1)
13e		No
13f		No
13g		Yes
13h		No
14	Wands correct procedures; completes	Does not Meet Standard
14b		No
14c		No
14d		No
14e		No
14f	Leg to the foot	Yes
14g		No
15	Informs and asks person to divest	Does not Meet Standard
16	Re-wands alarmed area ,if items are divested	
17	Informs and conducts pat-down	
18	On alarm, ask to	
19		Meets Standard
20	Re-wand area	Meets Standard
21	On alarm, ask for	Does not Meet Standard
22	Correctly and completely performs step forward method	Does not Meet Standard
22a	Screens front: asks person to step forward	No
22b	HW	Yes

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22c	Repeat with opposite leg: HW	Yes
22d	Screens back: Ask the person to step forward	No
22e	HW	No
22f	Repeat with opposite leg. Ask the person to return to the original stance	No
23	Communicates to person throughout process, explaining in clear and concise	Meets Standard
24	Communicates with person in polite and respectful manner	Meets Standard
25	When conducting the pat-down procedures uses back of hand in sens	Does not Meet Standard
26	Finds prohibitive item:	N/A
	* Please enter any additional comments:	Does not Meet Standard
a	Does not follow SOPs	Yes
b	Does not have ready familiarity of procedures	No (520.5(b)(9)(i))
c	Too assertive when dealing with passenger	No
d	Too passive when dealing with passenger	No
e	Applies too much physical force with passenger	No
f	Applies too little physical force with passenger	No
	* Please enter any additional comments:	
g	Takes too much time performing function	No
h	Rushes through function	No
i	Does not proper actions with respect to prohibitive item found	No
j	Does not effectively explain regulations to passenger when prohibitive it	No
k	Does not exercise care when dealing with passengers' property	No

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0	Employee	ware, raymond
0	Score	22
0	Date	Nov 7 2003 12:00AM
0	Retest	Yes
0	Pass	No
1	Informs person of HHMD search	Meets Standard
2	Asks person to divest metallic items	Meets Standard
3	Asks person if there is anything on his/her person that may cause the HH	Does not Meet Standard
4	Tests the HHMD before screening person	Meets Standard
5	Positions person facing his/her property §1520.5(b)(4)(i)	Meets Standard
6	Asks person to be seated	Meets Standard
7	Hand wands footwear and removes if alarms	Meets Standard
8	Hand wands feet without shoes	Does not Meet Standard
9	Asks person to stand with feet shoulder-width apart; arms outstretched	Meets Standard
10	Starts	Meets Standard
11	Uses correct HW	Meets Standard
12	Hand wands between	Meets Standard
13	Wands using correct procedures; completes	Meets Standard
13b		
13c		
13d		
13e		1520.5(b)(4)(i)
13f		
13g		
13h		
14	Wands correct procedures; completes	Meets Standard
14b		
14c		
14d		
14e		
14f	Leg to the foot	
14g		
15	Informs and asks person to divest	Yes
16	Re-wands alarmed area, if items are divested	Meets Standard
17	Inform and conduct pat-down	Meets Standard
18	On alarm, ask to	Meets Standard
19		Meets Standard
20	Re-wand area	Meets Standard
21	On alarm, ask for	Meets Standard
22	Correctly and completely performs step forward method	N/A
22a	Screens front: asks person to step forward	
22b	HW	

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22c	Repeat with opposite leg: HW	
22d	Screens back: Ask the person to step forward	
22e	HW	
22f	Repeat with opposite leg. Ask the person to return to the original stance	1520.5(b)(4)(i)
23	Communicated to person throughout process, explaining in clear and concis	Meets Standard
24	Communicates with person in polite and respectful manner	Meets Standard
25	When conducting the pat-down procedures uses back of hand in sens	Meets Standard
26	Finds prohibitive Item:	No
	* Please enter any additional comments:	Does not Meet Standard
a	Does not follow SOPs	No
b	Does not have ready familiarity of procedures	No
c	Too assertive when dealing with passenger	No
d	Too passive when dealing with passenger	No
e	Applies too much physical force with passengerr	No
f	Applies too little physical force with passenger	No
	* Please enter any additional comments:	
g	Takes too much time performing function	No
h	Rushes through function	No
i	Does not proper actions with respect to prohibitive item found	No
j	Does not effectively explain regulations to passenger when prohibitive it	No
k	Does not exercise care when dealing with passengers' property	No

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0	Employee	ware, raymond
0	Score	17
0	Date	Nov 6 2003 12:00AM
0	Retest	No
0	Pass	No
1	Informs person of HHMD search	Meets Standard
2	Asks person to divest metallic items	Does not Meet Standard
3	Asks person if there is anything on his/her person that may cause the HH	Does not Meet Standard
4	Tests the HHMD before screening person	Does not Meet Standard
5	Positions person facing his/her property	Meets Standard
6	Asks person to be seated §1520.5(b)(4)(i)	Does not Meet Standard
7	Hand wands footwear and removes if alarms	Does not Meet Standard
8	Hand wands feet without shoes	Does not Meet Standard
9	Asks person to stand with feet shoulder-width apart; arms outstretched	Meets Standard
10	Starts	Meets Standard
11	Uses correct HW	Meets Standard
12	Hand wands between	Meets Standard
13	Wands using correct procedures; completes	Meets Standard
13b		
13c		
13d		
13e		
13f		
13g		
13h		
14	Wands correct procedures; completes	Meets Standard
14b		
14c		
14d		
14e		
14f	Leg to the foot	
14g		
15	Informs and asks person to divest	Yes
16	Re-wands alarmed area, if items are divested	Meets Standard
17	Inform and conduct pat-down	Meets Standard
18	On alarm, ask to	Meets Standard
19		Does not Meet Standard
20	Re-wand area	Meets Standard
21	On alarm, ask for	Meets Standard
22	Correctly and completely performs step forward method	N/A
22a	Screens front: asks person to step forward	
22b	HW	

file:///S:/TSASharedFolders/COS/SSI/9000\_Miscellaneous\_Records/Hayakawa/EEO-Ware-03-HHMD2-Test%2001-09-06\_HTML.htm (1 of 2) 2/10/2006 3:44:11 PM

file:///S:/TSASharedFolders/COS/SSI/9000\_Miscellaneous\_Records/9895\_Ware\_v\_Hayakawa/EEO-Ware-03-HHMD2-Test%2001-09-06\_HTML.htm

22c	Repeat with opposite leg: HW	1520.5(b)(4)(i)
22d	Screens back: Ask the person to step forward	
22e	HW	
22f	Repeat with opposite leg. Ask the person to return to the original stance	
23	Communicated to person throughout process, explaining in clear and concise	Meets Standard
24	Communicates with person in polite and respectful manner	Meets Standard
25	When conducting the pat-down procedures uses back of hand in sens	Meets Standard
26	Finds prohibitive item:	Yes
	* Please enter any additional comments:	Does not Meet Standard
a	Does not follow SOPs	Yes
b	Does not have ready familiarity of procedures	Yes
c	Too assertive when dealing with passenger	No
d	Too passive when dealing with passenger	No
e	Applies too much physical force with passenger	No
f	Applies too little physical force with passenger	No
	* Please enter any additional comments:	
g	Takes too much time performing function	No
h	Rushes through function	No
i	Does not proper actions with respect to prohibitive item found	No
j	Does not effectively explain regulations to passenger when prohibitive it	No
k	Does not exercise care when dealing with passengers' property	No

file:///S:/TSASharedFolders/COS/SSI/9000\_Miscellane...Hayakawa/EEO-Ware-03-HHMD2-Test%2001-09-06\_HTML.htm (2 of 2)/10/2006 3:44:11 PM

**Exhibit No.** B



DAPHNE E. BARBEE 2911  
Attorney At Law  
1188 Bishop St., Suite 1909  
Honolulu, Hawaii 96813  
Telephone No.: (808) 533-0275

Attorney for Plaintiff

FILED IN THE  
UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

926

at 1 o'clock and 00 min. ✓ M  
SUE BEITIA, CLERK

IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF HAWAII

RAYMOND WARE, ) CIVIL NO. 04-00671 HG LEK  
)  
Plaintiff, ) FIRST AMENDED COMPLAINT;  
) FIRST AMENDED SUMMONS  
vs. )  
)  
SIDNEY HAYAKAWA, Director of )  
Transportation Security Administration )  
- Honolulu, KEN KAMAHELE, Deputy )  
Director, Transportation Security )  
Administration-Honolulu; )  
TRANSPORTATION SECURITY )  
ADMINISTRATION; THOMAS J. )  
RIDGE, Secretary, Department of )  
Homeland Security, DEPARTMENT )  
OF HOMELAND SECURITY; )  
LOCKHEED-MARTIN; JOHN DOES )  
2-5, )  
)  
Defendants. )

**FIRST AMENDED COMPLAINT**

COMES NOW, Plaintiff RAYMOND WARE, by and through his attorney, DAPHNE E. BARBEE and complains against the above-named Defendants as follows:

**PARTIES**

1. Plaintiff is an African-American male and is a resident of the State of Hawaii, residing in Honolulu, Hawaii.
2. Defendant SIDNEY HAYAKAWA is the TSA Security Director in Honolulu at all times relevant herein and is sued in his official capacity.
3. Defendant KEN KAMAHELE is the Deputy Federal Security Director for TSA Honolulu and is sued in his official capacity.
4. Defendant TRANSPORTATION SECURITY ADMINISTRATION (TSA) is a federal agency which at all times alleged employed more than forty (40) federal employees in Honolulu, Hawaii.
5. At all times relevant herein, Defendant DEPARTMENT OF HOMELAND SECURITY ("DHS") is situated in Washington, D.C., and from on or about March 1, 2003, is the Federal Agency which enables and empowers the Federal TRANSPORTATION SECURITY ADMINISTRATION (TSA) for its

operations in providing airport security in the State of Hawaii, and at all times alleged herein employed more than forty (40) Federal employees.

6. Defendant THOMAS J. RIDGE is the Secretary of Defendant DEPARTMENT OF HOMELAND SECURITY, and is named herein in his official capacity.

7. Defendant LOCKHEED-MARTIN is substituted for John Doe 1 in the original Complaint. Said Defendant is sued in its official capacity, and is a company which does business in Hawaii and worked in concert with Defendant TSA to deprive Plaintiff of his civil rights.

8. Plaintiff is ignorant of the true names and capacities of John Does 2-5 sued herein as Doe Defendants and therefore sue said Defendants by such fictitious names. Plaintiff will amend his Complaint to allege their true names and thereon allege that each of the fictitiously named Defendants are responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages, as herein alleged, were proximately caused by their conduct. Plaintiff has made good faith and diligent efforts to identify said Defendants. Plaintiff alleges that at all times herein, Defendants and each of them were agents, servants, employees, contractors with other named Defendants herein and were acting with permission and consent of said agency and employment.



9. At all times relevant herein, named Defendants acted under color of Federal law. Defendants' conduct was reckless, willful, intentional, and deliberately indifferent to the rights and protections of Plaintiff.

### **JURISDICTION**

10. Jurisdiction of this action is proper in this Court under Title VII of the Civil Rights Act as amended, 42 U.S.C. Sec. 2000e et seq. and 28 U.S.C. Sec. 1331.

11. Plaintiff has complied with all the jurisdictional requirements to this action as follows:

Plaintiff has filed this action after 180 days from filing of a formal EEO complaint with the federal agency and after 60 days from requesting a final agency decision and right to sue. 29 CFR 1614.407.

### **VENUE**

12. Venue of this action is proper in this Court and district pursuant to 42 U.S.C. Sec. 2000e and 28 U.S.C. § 1391(b)(2) and (c) in that the events, acts, and omissions giving rise to Plaintiff's claims herein are in Honolulu, Hawaii.

FACTS

13. Plaintiff Raymond Ware was employed at TSA Honolulu as a Checkpoint Screening Supervisor, from May 2002 to November 25, 2003, when he was terminated.

14. At all times relevant to this action, Title VII of the Civil Rights Act was in full force and effect in the United States and applied to Federal agencies.

15. Defendant TSA treated Plaintiff differently from other non African American employees by not assigning him as a rotating screening manager from October 2002 through February 2003 and not giving him training even though other non African American screening supervisors were selected as rotating screening managers and given training.

16. In May 2003, Plaintiff applied for a promotion as a screening manager at TSA Honolulu.

17. In May 2003 Plaintiff filed an informal EEO complaint with TSA alleging Defendants discriminated against him on the basis of race when they did not select him for promotion and for rotating screening manager.

18. On June 15, 2003, Defendant TSA selected four screening supervisors who were not African Americans for the vacant screening manager positions.

19. On August 19, 2003, Plaintiff filed a formal EEO complaint of discrimination against Defendant.

20. Plaintiff applied for another promotion vacant position as screening manager in August 2003.

21. On August 19, 2003, Plaintiff filed a formal EEO complaint of discrimination against Defendant.

22. On September 8, 2003, Defendant TSA denied Plaintiff the promotion and selected non African Americans screeners to the vacant positions as screening manager.

23. On September 9, 2003, Plaintiff wrote to Defendant Hayakawa expressing his belief that he was not promoted based upon discrimination, retaliation and requested reasons why he was not selected for promotion.

24. Plaintiff amended his EEO complaint on September 5, 2003 to include retaliation and discrimination on the basis of race by Defendants.

25. After amending his EEO complaint, Plaintiff met with Defendant Hayakawa who referred him to Defendant Kamahale as the person who made hiring decisions.

26. Plaintiff met with Defendant Kamahale on October 2, 2003, and he was told for the first time that there were complaints in his personnel file.

27. Plaintiff's last and only work evaluation at Defendant TSA was rated as "outstanding."

28. After meeting with Defendants Hayakawa and Kamahele, and after filing EEO complaints, Plaintiff was told he had to undergo a re-certification test.

29. Defendant TSA contracted with Defendant LOCKHEED-MARTIN to administer and conduct recertification tests to Honolulu TSA screeners.

30. In October 2003, Plaintiff completed the recertification test administered by employees of Defendant LOCKHEED-MARTIN, Defendants John Does 2 and 3, at the premises of the Honolulu Airport.

31. Plaintiff was told by Defendant TSA that he did not pass the recertification test and was terminated November 25, 2003.

32. Plaintiff asked for test results and facts from Defendants TSA and Lockheed- Martin, for proof showing how and in what manner he failed the recertification test. Defendants refused his requests for the test result information claiming it was privileged.

33. Plaintiff believes he was terminated by Defendant TSA in retaliation for complaining of race discrimination and that the test results were not accurate reflections of his ability to screen passengers at Honolulu Air Port.

34. Defendant TSA treated non-African American employees better in that

other screeners and screening supervisors were not required to take recertification tests by Defendant Lockheed-Martin, were given promotional opportunities, were not targeted and smeared with false complaints in their personnel file, and were not terminated for failing the recertification test.

35. The acts and conduct of Defendants created a hostile and offensive work environment in violation of Title VII of the Civil Rights Act, as amended.

36. As a direct result of the discriminatory acts of Defendants, Plaintiff has suffered grievous harm including but not limited to substantial loss of income and employment benefits, and emotional distress.

### **COUNT I**

#### **PLAINTIFF'S CLAIM OF RACE DISCRIMINATION IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT**

37. The facts, statements, and allegations contained in paragraphs 1 through 36 of this Complaint are hereby reaverred and reaffirmed in every particular and expressly incorporated herein by reference.

38. Defendant TSA Honolulu treated non-African American screening supervisors who were similarly situated as Plaintiff better in that they were granted promotions, training, were not required to take the recertification test and/or were not terminated for failing the re-certification test.

39. In denying Plaintiff promotions and then subsequently terminating him, Defendants TSA Honolulu and LOCKHEED-MARTIN violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 and intentionally discriminated against him because of his race, African American.

### COUNT II

40. The facts, statements, and allegations contained in paragraphs 1 through 39 of this Complaint are hereby reaverred and reaffirmed in every particular and expressly incorporated herein by reference.

41. The manner in which Defendant Lockheed-Martin conducted the recertification test on Plaintiff and the manner in which the result was calculated was discriminatory on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 because of Plaintiff's race, African American.

### COUNT III

#### RETALIATION

42. The facts, statements, and allegations contained in paragraphs 1 through 41 of this Complaint are hereby reaverred and reaffirmed in every particular and expressly incorporated herein by reference.

43. Defendant's discriminatory acts and termination of Plaintiff was in retaliation for Plaintiff's opposing and complaining about discriminatory practices in violation of Sec.704 (a) of Title VII of the Civil Rights Act of 1964 , 42 U.S.C. Sec. 2000e-3(a).

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff demands judgment against Defendant in the following particulars:

- (a) Compensatory damages in the amount not to exceed \$300,000.00 for each Count;
- (b) Punitive damages in an amount not to exceed \$300,000.00 for each Count;
- (c) Injunctive relief against Defendant and an order of reinstatement for plaintiff;

(d) For the modification or elimination of practices, policies, customs and usages set forth herein and all of the practices shown to be in violation of applicable law so they do not discriminate on the race;

(e) Compensating Plaintiff for all earnings, wages, special damages and other benefits he would have received but for the discriminating practices of Defendant;

(f) Plaintiff's costs and expenses of this litigation, including reasonable attorney's fees as allowed by law; and

(g) Such further relief which this Court, in its discretion, deems proper.

A demand for jury trial was made in the original Complaint filed herein.

DATED: Honolulu, Hawaii, 7-26-05.

  
\_\_\_\_\_  
DAPHNE E. BARBEE  
Attorney for Plaintiff



AO 440 (Rev. 8/01) Summons in a Civil Action

UNITED STATES DISTRICT COURT

District of HAWAII

RAYMOND WARE,

Plaintiff,

FIRST AMENDED

SUMMONS IN A CIVIL CASE

V.

SIDNEY HAYAKAWA, Director of  
Transportation Security Admin.-Hon.,

KEN KAMAHELE, Deputy Dir.,

Trans. Sec. Admin.-Hon.;

CASE NUMBER: 04-00671 HG LEK

TRANSPORTATION SECURITY ADMINI-  
STRATION; THOMAS J. RIDGE, Sec.,

Dept. of Homeland Security;

LOCKHEED-MARTIN; JOHN DOES 2-5,

Defendants.

TO: (Name and address of Defendant)

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DAPHNE E. BARBEE 2911  
Attorney At Law  
1188 Bishop St., Suite 1909  
Honolulu, Hawaii 96813  
Telephone (808) 533-0275

An answer to the first amended complaint which is served on you with this summons, within 20 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the first amended complaint. Any answer that you serve on the parties to this action be filed with the Clerk of this Court within a reasonable period of time after service.

SUE DEITIA

JUL 26 2005

CLERK

DATE

/s/ Drew Tomimoto

(By) DEPUTY CLERK

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served upon the following party at their last-known address by means of hand delivery, on 6-22-06.

THOMAS A. HELPER, ESQ.  
Assistant U.S. Attorney  
Rm. 6-100, Federal Building  
300 Ala Moana Blvd.  
Honolulu, Hawaii 96850  
Attorney for Responding Agency

DATED: Honolulu, Hawaii, 6-22-06.

  
\_\_\_\_\_  
DAPHNE E. BARBEE  
Attorney for Plaintiff

Exhibit No. 4



DAPHNE E. BARBEE

ATTORNEY AT LAW

1188 BISHOP STREET, SUITE 1909, HONOLULU, HAWAII 96813  
TELEPHONE (808) 533-0275

March 16, 2006

Thomas A. Helper, Esq.  
Assistant U.S. Attorney  
PJKK Federal Building  
300 Ala Moana Blvd., Rm. 6-100  
Honolulu, Hawaii 96850

**Re: Ware v. Hayakawa, et al.**  
**Civil No. 04-00671 HG-LEK**  
**DISCOVERY**

Dear Mr. Helper:

We are requesting discovery of the personnel files for the following employees who were given a promotion to the position of Screening Manager. The names of the employees who were selected for promotion in June 2003 are Warren Kadakawa, Danny Cappel, Edward Morrin, and William Waters. (See F-10, EEO Investigative Report) These individuals' personnel files were not made available for review yet. This was an issue in my client's underlying EEO complaint at page 2 of the EEO investigation. My client alleged he was passed over for Screening Manager in June 2003 as well as September 2003.

We also request the personnel files of all persons itemized under F-10, page 48, overview of 2-year record of Screening Manager by rates beginning with December 3, 2002 up through October 19, 2003, S-10 G48 in the investigative files. My client alleges he was passed over for Screening Manager in June 2003 as well as September 2003.

Please contact me when the personnel files are available for review.

Sincerely,

DAPHNE E. BARBEE  
Attorney at Law

DEB:kc  
cc: Mr. Ware

other screeners and screening supervisors were not required to take recertification tests by Defendant Lockheed-Martin, were given promotional opportunities, were not targeted and smeared with false complaints in their personnel file, and were not terminated for failing the recertification test.

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(c) Injunctive relief against Defendant and an order of reinstatement for plaintiff;

(d) For the modification or elimination of practices, policies, customs and usages set forth herein and all of the practices shown to be in violation of applicable law so they do not discriminate on the race;


(e) Compensating Plaintiff for all earnings, wages, special damages and other benefits he would have received but for the discriminating practices of Defendant;

(f) Plaintiff's costs and expenses of this litigation, including reasonable attorney's fees as allowed by law; and

(g) Such further relief which this Court, in its discretion, deems proper.

A demand for jury trial was made in the original Complaint filed herein.

DATED: Honolulu, Hawaii, 2-26-05

  
\_\_\_\_\_  
DAPHNE E. BARBEE  
Attorney for Plaintiff



AO 440 (Rev. 8/01) Summons in a Civil Action

UNITED STATES DISTRICT COURT

District of HAWAII

RAYMOND WARE,

Plaintiff,

FIRST AMENDED  
SUMMONS IN A CIVIL CASE

V.

SIDNEY HAYAKAWA, Director of  
Transportation Security Admin.-Hon.,

KEN KAMAHELE, Deputy Dir.,

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TRANSPORTATION SECURITY ADMINI-  
STRATION; THOMAS J. RIDGE, Sec.,

Dept. of Homeland Security;

LOCKHEED-MARTIN; JOHN DOES 2-5,

Defendants.

TO: (Name and address of Defendant)

YOU ARE HEREBY SUMMONED and required to serve on PLAINTIFF'S ATTORNEY (name and address)

DAPHNE E. BARBEE 2911  
Attorney At Law  
1188 Bishop St., Suite 1909  
Honolulu, Hawaii 96813  
Telephone (808) 533-0275

An answer to the first amended complaint which is served on you with this summons, within 20 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the first amended complaint. Any answer that you serve on the parties to this action be filed with the Clerk of this Court within a reasonable period of time after service.

SUE BEITIA

JUL 26 2005

CLERK

/s/ Drew Tomimoto

DATE

(By) DEPUTY CLERK

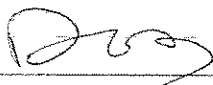


CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was duly served upon the following party at their last-known address by means of hand delivery, on 6-22-06.

THOMAS A. HELPER, ESQ.  
Assistant U.S. Attorney  
Rm. 6-100, Federal Building  
300 Ala Moana Blvd.  
Honolulu, Hawaii 96850  
Attorney for Responding Agency

DATED: Honolulu, Hawaii, 6-22-06.

  
\_\_\_\_\_  
DAPHNE E. BARBEE  
Attorney for Plaintiff